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Nos. 03-1521 and 03-1532

In the Supreme Court of the United States

VISA U.S.A., INC., PETITIONER

v.

UNITED STATES OF AMERICA

MASTERCARD INTERNATIONAL INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's judgment that the membership rules of two payment-card networks, which bar members of those networks from issuing cards on competing networks not controlled by those members, violate Section 1 of the Sherman Act, 15 U.S.C. 1, in light of the district court's findings that the rules produce anticompetitive effects, harm consumers, and lack procompetitive justification.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 344 F.3d 229.[1] The opinion and proposed final judgment of the district court (Pet. App. 24a-178a) are reported at 163 F. Supp. 2d 322. The district court's modification of the proposed final judgment (Pet. App. 179a-188a) is reported at 183 F. Supp. 2d 613.

[1] All references to "Pet. App." in this brief are to the petition appendix in No. 03-1521.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2003. Petitions for rehearing were denied on January 9, 2004 (Pet. App. 193a; 03-1532 Pet. App. 24a-25a). On March 19 and 25, 2004, Justice Ginsburg extended the time within which to file petitions for a writ of certiorari to and including May 8, 2004, and the petitions were filed on May 10, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal." 15 U.S.C. 1.

STATEMENT

The United States brought this action against petitioners Visa U.S.A., Inc. (Visa), and MasterCard International Inc. (MasterCard), asserting, among other things, that certain membership rules of petitioners' payment-card networks violate Section 1 of the Sherman Act, 15 U.S.C. 1. The United States District Court for the Southern District of New York concluded, after a full trial on the merits, that the network rules precluding members from issuing cards on networks not controlled by those members violate Section 1. The court of appeals affirmed that judgment. Pet. App. 6a, 23a.

1. Visa, MasterCard, the American Express Company (Amex), and Discover Financial Services (Discover) issue general purpose credit and charge cards, Pet. App. 32a-33a, that allow cardholders to make

purchases from participating merchants through a payment network. They are the "four major network systems in the payment card industry." *Id.* at 6a. In 1999, Visa processed 47% of general purpose card transactions, as measured by dollar volume, while MasterCard processed 26%, Amex processed 20%, and Discover processed 6% during that same period. *Id.* at 51a.

Visa and MasterCard operate as joint ventures that are created, owned, and governed by their thousands of members, which are primarily banks.[2] Pet. App. 6a. The memberships of the two associations overlap substantially. *Ibid.* Visa and MasterCard provide network services to their member banks, which individually act as "issuers" (issuing cards to consumers) and "acquirers" (providing acceptance services to merchants). See *id.* at 6a-9a (describing the structure and operation of the Visa and MasterCard networks). Visa and MasterCard member banks collectively account for 85% of all general purpose card issuance. *Id.* at 138a; see *id.* at 146a-148a.

Amex and Discover are vertically integrated corporations that "combine[] issuing, acquiring, and network functions" in a so-called "closed loop" system. Pet. App. 8a. Unlike the bank-owned associations, "Amex and Discover deal directly with consumers (by issuing cards) and with merchants (by acquiring and processing transactions)." *Ibid.* Amex and Discover compete as networks against Visa and MasterCard and also compete as issuers against the thousands of Visa and MasterCard members. *Id.* at 10a, 36a. Amex is ac-

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[2] Although the members include various types of financial institutions, "nothing turns on" the members' corporate structure or other lines of business. Pet. App. 6a. This brief, like the court of appeals' decision, refers to the members simply as "banks."

cepted at significantly fewer merchants, in the United States and worldwide, than Visa or MasterCard. *Id.* at 135a-136a. Discover's merchant acceptance rate, negligible outside the United States, is nearly 90% that of Visa/MasterCard in the United States, but the acceptance gap is nevertheless Discover's "biggest strategic issue." *Id.* at 136a, 137a.

2. The United States filed a complaint alleging that Visa and MasterCard engaged in anticompetitive practices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Count I challenged petitioners' governance practices, which permit a member of either association to have representatives on the board and governing committees while issuing substantial numbers of cards on the other network. Count II challenged Visa's Bylaw 2.10(e) and MasterCard's Competitive Programs Policy (CPP) (together, the "exclusionary rules," Pet. App. 11a). Those rules permit member banks to issue credit and charge cards on both the Visa and MasterCard networks, and on other bank-controlled networks, but prohibit member banks from issuing cards on the Amex or Discover networks. *Id.* at 5a.[3]

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[3] Visa Bylaw 2.10(e) states:

> The membership of any Member shall automatically terminate in the event it, or its parent, subsidiary or affiliate, issues, directly or indirectly, Discover Cards, or American Express Cards, or any other card deemed competitive by the Board of Directors.

Pet. App. 8a n.3. MasterCard's CPP similarly states:

> [W]ith the exception of participation [by members] in Visa, which is essentially owned by the same member entities, and several pre-existing programs to the extent individual members participate, [most notably Diners Club and JCB,] members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs.

After a 34-day bench trial, the district court issued more than 145 pages of findings of fact and conclusions of law. Pet. App. 31a; *id.* at 24a-178a. It ruled in petitioners' favor on Count I, but held that the exclusionary rules challenged in Count II violate the Sherman Act. In holding the exclusionary rules unlawful, the district court applied a "full-fledged rule of reason analysis," considering "all of the circumstances of [the] case." *Id.* at 54a (quoting *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)).

The court found that Visa and MasterCard, "jointly or separately," had market power in the network services market. Pet. App. 51a; see *id.* at 48a-53a. It further found that the result of Bylaw 2.10(e) and the CPP, "as intended, has been that no bank has broken rank; rather than lose access to the Visa and MasterCard networks (as well as their ATM networks, Cirrus and Plus), no bank in the continental United States has agreed to issue American Express" or Discover cards. *Id.* at 158a; see *id.* at 9a, 15a-16a.

The district court determined that the exclusionary rules were "restrictions of, by and for the member banks," and were properly characterized as horizontal restraints. Pet. App. 157a, 167a. The court found that,

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Ibid. (bracketed material omitted by court of appeals). These exclusionary rules permit member banks to issue cards on the Diners Club and JCB networks, even though at the time of Bylaw 2.10(e)'s adoption, "the worldwide volume on the Diners Club and Discover networks were about equal." *Id.* at 120a-124a. Citicorp, the largest individual issuer of Visa and MasterCard cards, owns the Diners Club network and issues all Diners cards in the United States. *Id.* at 121a n.19. JCB, a prominent card in Japan, granted Household Bank—whose president was also Chairman of MasterCard—exclusive rights to issue JCB cards in the United States; Household, however, never issued any JCB cards. *Ibid.*

through the challenged rules, Visa's and MasterCard's member banks agreed collectively within their respective networks to deny Amex and Discover access to the banks' "special skills, expertise and relationships with consumers that collectively strengthen the general purpose card networks." *Id.* at 138a. See *id.* at 138a-142a. For example, the challenged rules prevent Amex and Discover from developing new customer relationships and card products based on the customer's use of bank-controlled demand deposit accounts, which would permit the issuance of debit cards and other debit-based payment devices. See *id.* at 142a-146a. The court also found that the challenged rules deny consumers access to cards with new features made possible by combining the resources of non-bank networks and bank issuers. See *id.* at 148a-151a.

The district court further found that "[n]etwork services output is necessarily decreased and network price competition restrained by the exclusionary rules." Pet. App. 120a. More specifically, the exclusionary rules

> weaken competition and harm consumers by: (1) limiting output of American Express and Discover cards in the United States; (2) restricting the competitive strength of American Express and Discover by restraining their merchant acceptance levels and their ability to develop and distribute new features such as smart cards; (3) effectively foreclosing American Express or Discover from competing to issue off-line debit cards, which soon will be linked to credit card functions on a single smart card, and (4) depriving consumers of the ability to obtain credit cards that combine the unique features of their preferred bank with any of

> four network brands, each of which has different qualities, characteristics, features, and reputations.

Id. at 29a-30a. The court found that, in the absence of the exclusionary rules, overall card output would increase and Visa and MasterCard "would respond to greater network competition from American Express and Discover by increasing their own competitive intensity." *Id.* at 151a (emphasis omitted). The court also found that the Visa and MasterCard banks "restrict competition among themselves by ensuring that so long as all of them cannot issue American Express or Discover cards, none of them will gain the competitive advantage of doing so." *Id.* at 30a.

Finally, the district court found that petitioners "offered no persuasive procompetitive justification" that might outweigh the "adverse effect[s] on both the issuing and the network market." Pet. App. 120a, 169a. The court noted that the government did not dispute the legitimacy of the joint ventures, and the court expressly recognized that joint ventures "may employ reasonable restraints to make the joint venture more efficient." *Id.* at 156a. The court considered at length petitioners' contention that Bylaw 2.10(e) and the CPP promote efficiency by encouraging loyalty to—and cohesion within—the associations, *id.* at 156a-169a, but it found that proffered justification unsupported by the facts, especially "contemporaneous evidence," *id.* at 157a-161a.

The district court found unpersuasive petitioners' efforts to reconcile the provisions of the exclusionary rules allowing member banks to issue cards on competing networks controlled by banks—even though Visa and MasterCard are each other's largest competitor—with their contention that the rules are justified

by a need to ensure member banks' loyalty. Pet. App. 161a-169a. The court also found petitioners' asserted concerns that permitting individual member banks to gain a competitive advantage vis-à-vis other member banks by issuing cards on the Amex or Discover networks would undermine the cohesion and stability of the bank-owned associations "belie[d]" by the associations' history of affording to some members competitively significant advantages not available to others. *Id.* at 166a-167a.[4]

The district court rejected petitioners' claim that permitting individual banks to choose to issue Amex cards would be particularly disruptive to their "fragile" associations. Pet. App. 162a, 164a-165a. Noting that petitioners' label of "cherry picking" was merely a "pejorative term" (*id.* at 160a) for "competition," the court explained that there was "no evidence as to why it would be any more opportunistic for American Express to offer a deal to a large issuing bank than it is for MasterCard to offer a special deal to a Visa bank." *Id.* at 164a; see *id.* at 164a-166a. Moreover, the court found that member banks in Puerto Rico and abroad had been issuing Amex cards, with some of those members even

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[4] In particular, the district court found that: (1) each association paid millions of dollars to a few members to induce dedication to that joint venture, even though such payments "did not offer new value to cardholders or to the association" (Pet. App. 99a; see *id.* at 100a, 162a-163a); (2) both Visa and MasterCard had different classes of membership carrying different governance rights and fees (*id.* at 161a-163a); (3) each permitted Citicorp and Household to issue cards that no other member could (*id.* at 121a & n.19); (4) each tolerated members with varying degrees of dedication, or even dedication to the other association (*id.* at 162a-163a); and (5) Visa embraced Citibank's continued membership, despite its dedication to MasterCard while continuing to control Diners Club (*id.* at 163a).

being invited to sit on Visa International's regional boards (*id.* at 165a)—all without any damage to the joint ventures' cohesion or stability.

To remedy the anticompetitive practices, the district court ordered Visa and MasterCard to repeal their exclusionary rules and to refrain from "enacting, maintaining, or enforcing" any similar bylaw, rule, policy, or practice in the future. Pet. App. 190a.

3. The court of appeals affirmed the district court's judgment. Pet. App. 1a-23a. The court of appeals agreed with the district court that the exclusionary rules "are properly analyzed under the rule of reason." *Id.* at 11a-12a; see *id.* at 53a-56a. Praising the district court's "commendably comprehensive and careful opinion" (*id.* at 5a), the court considered and affirmed the critical findings regarding market definition (*id.* at 13a-14a), petitioners' market power (*id.* at 14a-15a), anticompetitive effects (*id.* at 16a-18a), and petitioners' proffered procompetitive justifications (*id.* at 21a-22a).

The court of appeals agreed with the district court that "this case involves two interrelated, but separate, product markets: (1) * * * the general purpose card market * * *, and (2) the network services market for general purpose cards." Pet. App. 13a. Although competition is "robust at the issuing level (where 20,000 separate issuers compete to provide products to consumers)," *id.* at 16a, in the network market, only "the four payment card networks compete with one another" for the "banks' business" and merchant acceptance. *Id.* at 14a.

In particular, the court agreed with the district court's findings that "Visa U.S.A. and MasterCard, jointly and separately, have power within the market for network services," Pet. App. 14a-15a; see *id.* at 48a-53a, and that the exclusionary rules harm competition

by "'reducing overall card output and available card features,' as well as by decreasing network services output and stunting price competition." *Id.* at 16a; see *id.* at 120a. The court confirmed that the record "strongly indicated that price competition and innovation in services would be enhanced if four competitors, rather than only two, were able to compete * * * for issuing banks," in part due to "proactive[]" responses from Visa and MasterCard. *Id.* at 17a; see *id.* at 125a-126a, 151a-152a; see also *id.* at 21a (Visa and MasterCard "would be impelled to design and market their products more competitively."). The court of appeals also agreed that the exclusionary rules had "stunted" "product innovation and output" by "effectively deny[ing] consumers access to products that could be offered only by a network in partnership with individual banks." *Id.* at 17a-18a; *id.* at 21a.

The court of appeals rejected petitioners' attempts to liken their exclusionary rules to "'exclusive distributorship' arrangements" that are "presumptively legal." Pet. App. 18a (quoting *Electronics Communications Corp.* v. *Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997)). The court noted that the exclusionary rules are "horizontal restraint[s] adopted by 20,000 competitors" that have "agreed not to compete with the others in a manner which the consortium considers harmful to its combined interests." *Id.* at 20a. Citing *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984), the court concluded that, "[f]ar from being 'presumptively legal,' such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." Pet. App. 20a.

The court of appeals agreed with petitioners that "the proper inquiry is whether there has been an '*actual* adverse effect on competition as a whole in the

relevant market,'" Pet. App. 18a-19a (quoting *KMB Warehouse Distrib., Inc.* v. *Walker Mfg Co.*, 61 F.3d 123, 127 (2d Cir. 1995)), but it found "no fault" with the district court's finding that competition in the market for network services was harmed by Amex's and Discover's inability "to market their cards and programs to banks," *id.* at 21a. The court of appeals also agreed with the district court's "determination that certain types of products combining unique features of cards offered by Amex and Discover with the advantages of linkage to cardholders' bank accounts would likely become available" if the exclusionary rules were enjoined. *Ibid.* It further agreed with the district court that there was no factual basis for petitioners' claimed procompetitive justifications. *Id.* at 21a-22a. "In sum," the court of appeals concluded, "the defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits." *Id.* at 22a.[5]

ARGUMENT

The court of appeals unanimously affirmed the district court's determination that petitioners' exclusionary rules violate Section 1 of the Sherman Act. That decision, which rests squarely on the district court's comprehensive findings of fact after a lengthy trial,

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[5] In February 2004, after the court of appeals denied rehearing in this case, Amex and MBNA (a member of both the Visa and MasterCard associations) announced an agreement under which MBNA will begin issuing general purpose cards on the Amex network, while continuing to issue cards on the Visa and MasterCard networks. Because the district court issued a stay pending appeal, and the court of appeals has stayed its mandate pending this Court's review, the exclusionary rules remain in effect and MBNA has not yet begun issuing Amex cards.

does not conflict with any decision of this Court or any other court of appeals, and it does not present any legal issue warranting this Court's review.

1. The district court, "in a commendably comprehensive and careful opinion," conducted a thorough rule-of-reason analysis, resolved numerous disputed issues of fact, and concluded that petitioners' exclusionary rules violate Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 5a. The court found that petitioners have market power, that their members imposed horizontal restraints that cause several distinct types of harm to competition and consumers, and that the proffered justifications for those restraints lack factual support. *Id.* at 48a-53a, 118a-166a; cf. 03-1532 Pet. 14-15 (conceding that liability is appropriate if those elements are established). The unanimous court of appeals expressly affirmed those determinative findings, making this case particularly ill-suited for review by this Court. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

a. The court of appeals affirmed the district court's findings that Visa and MasterCard, which account for 73% of general purpose card transactions and 85% of card issuance, "jointly or separately" had market power in the network services market. Pet. App. 13a-15a, 51a. MasterCard's attack on the market power findings (03-1532 Pet. 23-24) falls far short of the *Graver* standard. Contrary to MasterCard's suggestion, the exclusionary rules have significant anticompetitive effects precisely because *both* of the major bank-owned associations adopted them, requiring any bank seeking to issue Amex or Discover cards to forgo issuing cards on both

the Visa and MasterCard networks, and leaving unaffected only competitively insignificant banks that do not currently issue any major card. Pet. App. 146a-148a. Thus, either association could have prevented the rules from having those effects. The banks, which control networks with market power, agreed to deny competing networks "relationships the competitors need in the competitive struggle." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (citation omitted).

b. Petitioners assert that the courts below merely "presume[d]" harm to competition, or based liability solely on harm to competitors, without finding that the exclusionary rules actually harmed consumers. 03-1521 Pet. 2-3, 12, 18-19; 03-1532 Pet. 9-10, 15-16, 22, 26, 30. That assertion is meritless and reflects a misreading of the decisions below. Far from presuming adverse competitive effects attributable to the exclusionary rules, the court of appeals endorsed the district court's "full-fledged rule-of-reason analysis," Pet. App. 54a, 56a, which identified in detail five distinct types of harm.

First, the district court found that, but for the exclusionary rules, there would be an increase in the quality and variety of general purpose cards available to consumers. That increase would result from banks issuing Amex and Discover cards and from increased efforts by Visa and MasterCard to compete by offering features consumers value. Pet. App. 148a-155a. Because banks work with a network's strengths to customize applications for particular customer segments, network competition significantly affects the quality and variety of cards offered. See *id.* at 148a-149a. The exclusionary rules, by contrast, "protect the associations' products from vigorous network competition." *Id.* at 158a. The court of appeals expressly concurred in

the district court's detailed findings, which provide concrete examples of anticompetitive effects. *Id.* at 21a.[6]

Petitioners attempt to dismiss the loss of product variety attributable to the exclusionary rules as unimportant to consumers. 03-1521 Pet. 20-21; 03-1532 Pet. 26. They argue that horizontal agreements requiring each member bank to deal only with bank-controlled networks enhances the incentives of member banks and networks to develop unique features. See, *e.g.*, 03-1532 Pet. 26. The district court considered those factual arguments and rejected them, finding that horizontal agreements precluding any member bank from issuing cards on the Amex or Discover networks harm consumers by forestalling competitively significant product innovation. See, *e.g.*, Pet. App. 152a-154a. The courts below properly recognized that the market, rather than competitors acting in concert, should decide whether and what innovations in product quality are important. See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *National Soc'y of Prof'l Eng'rs* v.

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[6] See, *e.g.*, Pet. App. 127a-128a (Banco Popular "offered features on the American Express cards it issued that were not features it offered on Visa cards"); *id.* at 144a (exclusionary rules "foreclose the competitive threat that American Express and Discover otherwise might pose" to next-generation "relationship" cards, which depend on access to consumers' checking accounts at banks); *id.* at 155a ("Visa and MasterCard reacted competitively to American Express' alliances with their foreign member banks."); *id.* at 151a (MasterCard recognized that it "would have to 'speed up' its development of a premium card product in response to the American Express initiative with member banks" and "consider partnering with a travel agency to compete with American Express travel services").

United States, 435 U.S. 679, 695 (1978); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4-5 (1958).[7]

Second, networks compete for bank patronage in the form of reduced network fees and incentive payments, and the exclusionary rules limit such competition to Visa and MasterCard, rather than all four major networks. Pet. App. 16a-17a; *id.* at 125a-126a. Petitioners question whether decreased network prices or improved network services would ultimately benefit consumers (03-1521 Pet. 18-21; 03-1532 Pet. 27-28), but there is no basis for special tolerance of conduct restraining competition in upstream or input markets. "In the long run consumers will benefit when upstream as well as downstream markets are made more competitive." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 916a, at 219 (Supp. 2004) (discussing upstream mergers). See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235-236 (1948) (Section 1 violation by sugar purchasers); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 803-804 (1946) (restraint on input tobacco market).[8]

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[7] MasterCard suggests that the court of appeals' analysis leads to the "paradox" that the exclusionary rules imposed by member banks injure those banks by restricting their ability to establish new and beneficial relationships. 03-1532 Pet. 27. But such self-imposed restraints are a common feature of anticompetitive agreements. Just as cartel participants willingly cede the ability to increase output in exchange for restrictions on rivals' outputs, each bank gave up its individual freedom to strike a potentially profitable arrangement with the Amex or Discover networks in exchange for the agreed-upon certainty that no other bank could do so either. Further, by keeping the Amex and Discover networks weak via the exclusionary rules, the banks seek to reduce the competitive pressure facing the networks they own.

[8] See *FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001) ("the antitrust laws assume that a retailer faced with an increase

Third, the district court also found that the exclusionary rules have the effect of "reducing overall output." Pet. App. 119a-120a; see *id.* at 129a-131a (Advanta expected to issue over three million Amex cards). Hence, the rules are akin to a classic output restriction. *Id.* at 168a. Visa's assertion that the challenged conduct does not reduce output in the general purpose card market (03-1521 Pet. i) ignores that finding.

Fourth, the exclusionary rules restrain competition for merchant acceptance services. Pet. App. 150a-151a; see *id.* at 21a (merchants are consumers of network services). The district court found that "merchants —and ultimately consumers—have an interest in the vigor of competition to ensure that interchange pricing points are established competitively," *id.* at 150a-151a, and that networks compete for merchants' favor in other ways as well, *id.* at 151a (Visa offered promotional support to Wal-Mart only after that merchant began accepting Discover cards).

Fifth, the district court found that bank issuance of Amex and Discover cards would lead to increased merchant acceptance of those cards. See Pet. App. 28a-30a, 125a-126a, 134a-137a, 159a (exclusionary rules "restrain[]" Amex's and Discover's merchant acceptance levels); see *id.* at 49a, 51a-52a (describing chicken-and-egg relationship between card issuance and merchant acceptance). Increased merchant acceptance of cards issued on competing networks directly benefits con-

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in the cost of one of its inventory items 'will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product'") (quoting *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997), cert. denied, 522 U.S. 1153 (1997) and 523 U.S. 1040 (1998)).

sumers by allowing them greater freedom to choose the card they will use.

c. Petitioners do not directly challenge the district court's detailed findings that petitioners' proffered justifications for the exclusionary rules lack factual support. See Pet. App. 156a-169a; see also pp. 7-9, *supra*. The court of appeals squarely affirmed the district court's findings. See Pet. App. 21a-22a. Petitioners nonetheless continue to characterize the challenged rules in this Court as "loyalty" rules, which, petitioners contend, should be presumed ancillary to their legitimate joint ventures and thus procompetitive. See 03-1521 Pet. 13, 15-16, 18, 20-21; 03-1532 Pet. i (referring to "a loyalty restriction ancillary to a joint venture"), 2, 10-11, 19-20.

There is no dispute that petitioners' joint ventures are legitimate, and the district court expressly acknowledged that joint ventures "may employ reasonable restraints to make the joint venture more efficient." Pet. App. 156a. Therefore, the district court correctly recognized that potentially ancillary restraints are judged under the rule of reason. Loyalty rules that bar co-venturers from competing with their joint enterprise will often be found to be procompetitive ancillary restraints. *E.g.*, *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 217-230 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899). It does not follow, however, that the rules at issue here *are* ancillary to their joint ventures simply because loyalty rules *may* be ancillary. Indeed, this Court and the courts of appeals have repeatedly invalidated anticompetitive agreements (including bylaws) even

when imposed by legitimate, procompetitive joint ventures.[9]

A challenged restraint is not "ancillary" merely because it is related to a legitimate joint venture or makes that joint venture better off. Such a lax standard "could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful transaction." 11 Herbert Hovenkamp et al., *Antitrust Law* ¶ 1908, at 229 (1998). Rather, an ancillary restraint must be "substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices." *Northwest Wholesale*, 472 U.S. at 296 n.7.[10]

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[9] See, *e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984) (NCAA rule restricting schools' ability to televise football games); *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (dentist trade association rule regarding providing x-rays to insurers); *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679 (1978) (professional association's bylaw regarding bidding practices); *NASL* v. *NFL*, 670 F.2d 1249 (2d Cir.) (NFL's cross-ownership rule), cert. denied, 459 U.S. 1074 (1982); *Sullivan* v. *NFL*, 34 F.3d 1091 (1st Cir. 1994) (NFL bylaw regarding public offering of team stock), cert. denied, 513 U.S. 1190 (1995); *Law* v. *NCAA*, 134 F.3d 1010 (10th Cir.) (NCAA rule regarding coaches' salaries), cert. denied, 525 U.S. 822 (1998).

[10] See *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) (there must be an "organic connection between the restraint and the cooperative needs of the enterprise"); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 290-291 (6th Cir. 1898) (must be "commensurate"), aff'd as modified, 175 U.S. 211 (1899); Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-798 (1965) (under *Addyston*, ancillary restraints are those "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective").

The question whether an agreement is ancillary is accordingly an issue of fact, see *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 266 (7th Cir. 1981), cert. denied, 455 U.S. 921 (1982), and petitioners' objections merely challenge the concurrent findings of the lower courts. The lower courts' rejection of petitioners' contentions that the exclusionary rules are simply "garden-variety" requirements that "ensure" members' loyalty to either joint venture (03-1521 Pet. 2, 7, 8, 29; 03-1532 Pet. 1, 12) are fully supported by the evidence adduced at trial. Petitioners' rules are far from "garden-variety" loyalty rules. Most glaringly, they allow member banks to issue cards on any bank-controlled network, even though Visa and MasterCard are each other's primary competitor and together account for 85% of all general purpose cards issued. Pet. App. 51a.[11] The district court also found "overwhelming" evidence that the associations did not adopt the exclusionary rules in response to a significant threat of destabilization. *Id.* at 162a-163a. The court found "no evidence of 'disruption' or 'lack of cohesion' outside the continental United States," where the exclusionary rules do not apply and "many" member banks issue Amex cards. *Id.* at 165a. These factual findings place petitioners' rules in an entirely different category than authentic loyalty rules and belie petitioners' claims of procompetitive justification. See *id.* at 161a-165a. The district court accordingly had ample cause to reject petitioners' claim that the exclusionary

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[11] Petitioners suggest (03-1521 Pet. 7 n.3, 8 n.4; 03-1532 Pet. 5, 8) that the Department of Justice required Visa to permit dual issuance, but the record is clear that MasterCard "has always maintained that duality is procompetitive" and Visa's acceptance of dual issuance was—and remains—voluntary. Pet. App. 58a-60a; 03-1532 Pet. 5.

rules were reasonably related to the efficiency of the joint ventures.[12]

2. Singling out a single sentence in the opinion of the court of appeals, Visa incorrectly asserts that the court of appeals deemed the exclusionary rules "presumptively unlawful" simply because they are agreements among competitors. 03-1521 Pet. 19. MasterCard similarly and incorrectly asserts that the court of appeals applied a standard "indistinguishable from *per se* condemnation." 03-1532 Pet. 23. The court of appeals did nothing of the kind. Rather, the court simply rejected petitioners' arguments that the rules should be treated as "presumptively legal" vertical distribution arrangements. Pet. App. 19a-20a. The court of appeals properly characterized each of the exclusionary rules as a "horizontal restraint—an agreement among competitors on the way in which they will compete with one another," *id.* at 20a (quoting *NCAA*, 468 U.S. at 99), and, under the facts presented here, "exemplars of the type of anticompetitive behavior prohibited by the Sherman Act," *ibid.*

The district court conducted a full-blown rule of reason inquiry, taking no short-cuts in examining both the competitive effects of, and proffered justifications for, petitioners' exclusionary rules. In affirming, the court of appeals relied on well-settled case law respecting the rule of reason, Pet. App. 11a-13a, 18a-20a, and concurred in the district court's findings that petitioners have market power and that their "conduct has

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[12] See *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250, 251 (1968) (rejecting similar justification for shippers' conference prohibiting its authorized travel agents from also selling tickets on non-conference ships, because the factfinder "found no indication * * * that elimination of the rule would in fact jeopardize the stability of the conference").

adversely affected competition * * * by 'reducing overall card output and available card features,' as well as by decreasing network services output and stunting price competition," *id.* at 13a-16a; see *id.* at 16a-21a. The court of appeals did not hold that the horizontal nature of the agreements rendered them presumptively illegal per se. Indeed, none of the cases that the court of appeals cited applied a per se theory.[13]

3. Contrary to petitioners' contentions (03-1521 Pet. 18-20; 03-1532 Pet. 15-16, 26, 30), the courts below broke no new legal ground in refusing to treat the exclusionary rules as mere vertical restraints on distribution that should be presumed legal unless they completely foreclose Amex and Discover from supplying consumers with cards. Bank issuers are "not merely distributors of commodity products such as spices or ice cream." Pet. App. 149a (internal quotation marks omitted). Rather, the courts below recognized that a network and an individual bank issuer combine their special skills and assets to create card products and services that neither could provide alone. See *id.* at 17a-18a, 21a, 134a-135a, 139a-140a, 148a-149a.

Nor are petitioners' associations—"consortiums of competitors" (Pet. App. 19a-20a)—entitled to be treated for all purposes under the antitrust laws as merely unitary firms. A joint venture controlled by competitors, such as Visa or MasterCard, sometimes

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[13] See *NCAA*, 468 U.S. at 100-104; *Fraser* v. *Major League Soccer, L.L.C.*, 284 F.3d 47, 58-59 (1st Cir.), cert. denied, 537 U.S. 885 (2002); *Capital Imaging Assocs., P.C.* v. *Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542-543 (2d Cir.), cert. denied, 510 U.S. 947 (1993); *Rothery Storage & Van Co.*, 792 F.2d at 223-229; *NASL* v. *NFL*, 670 F.2d at 1258-1259.

may act as a single entity.[14] The district court found, however, that the exclusionary rules are horizontal restraints—"agreement[s] among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99. See Pet. App. 157a ("restrictions of, by and for the member banks"); see also *id.* at 167a. Under those restraints, member banks have agreed not to offer consumers cards with features available from non-bank-controlled networks, thereby eliminating competitive pressure on themselves to do so and allowing them to insulate their dominant bank-controlled networks from effective competition. The "antitrust laws * * * have long drawn a sharp distinction" between vertical and horizontal restraints. *Toys "R" Us, Inc.* v. *FTC*, 221 F.3d 928, 930 (7th Cir. 2000). See *State Oil Co.* v. *Kahn*, 522 U.S. 3, 14 (1997) ("vertical restraints are generally more defensible than horizontal restraints"). Similarly antitrust law differentiates between concerted and unilateral action.[15]

The horizontal character of the exclusionary rules would not, of course, be sufficient in itself to condemn them. But the courts below properly took into account the horizontal nature of the challenged rules in per-

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[14] For example, a joint venture might offer a product in a market in which its owners could not separately compete or it might purchase supplies for its headquarters. Every bylaw is the product of an agreement, but not all bylaws implicate the banks as competitors.

[15] See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984) ("Congress treated concerted behavior more strictly than unilateral behavior."); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135-136 (1998); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) ("single-firm activity is unlike concerted activity covered by § 1, which 'inherently is fraught with anticompetitive risk'") (quoting *Copperweld*, 467 U.S. at 768-769).

forming a rule of reason analysis. See Pet. App. 18a-21a, 119a-155a. In the course of assessing the effect of those rules on competition, the courts carefully considered petitioners' arguments that the rules were reasonably related to the efficiency of their legitimate joint ventures. *Id.* at 21a-22a, 156a-169a. In so doing, the lower courts applied the proper legal standard, which does not turn on the label applied to the restraints. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 342 & n.12 (1990); *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 691; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 500-501 (1940); Pet. App. 18a-20a, 124a-125a.

Petitioners thus err in contending (03-1521 Pet. 29; see also 03-1532 Pet. 12-16) that the decision below creates "a palpable legal risk for all horizontal joint ventures." The only horizontal joint ventures threatened by the decision below are those in which the two leading dominant competitors in a highly concentrated market are joint ventures with overlapping ownership and have adopted restraints permitting their members to deal with the other dominant venture but not with other competitors, with the result that output is reduced, competition impeded, and innovation stifled. Petitioners make no showing that those attributes describe a substantial number of joint ventures.

4. Petitioners contend that the lower courts' decisions conflict with the Tenth Circuit's decision in *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958 (1994) (*MountainWest*), cert. denied, 515 U.S. 1152 (1995), and the District of Columbia Circuit's decision in *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (1986), cert. denied, 479 U.S. 1033 (1987). See 03-1521 Pet. 23-27; 03-1532 Pet. 16-19. Those contentions, which petitioners unsuccessfully advanced below, are without merit.

a. The Tenth Circuit's decision in *MountainWest* addressed whether Visa Bylaw 2.06, a different rule from the rule involved here, violated Section 1 of the Sherman Act, 15 U.S.C. 1. Visa Bylaw 2.06 did not restrict member banks from issuing Amex or Discover cards. Instead, it prevented a bank owned by Discover from becoming a member *of Visa* and issuing Visa cards. The Tenth Circuit held that Visa had not violated the antitrust laws by "refusing to * * * revise the bylaw to open its membership to intersystem [network] rivals." 36 F.3d at 972; see *id.* at 970. The parties had stipulated that the "case was intended to focus on the issuance of credit cards as the relevant market," and the Tenth Circuit emphasized that "[t]his is *intrasystem* competition." *Id.* at 967. Consequently, the court held that Visa, a network that does not itself issue cards, lacked market power in the stipulated market. *Id.* at 969.

The *MountainWest* courts found "no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity." 36 F.3d at 968. Discover wanted to issue a new card as yet another Visa issuer, but there was "no evidence" that Discover "needed Visa USA to develop the new card" it wanted to issue, *id.* at 972, nor was there any allegation of an adverse effect on competition to provide network services. Rather, Discover contended that issuing a new card "under the Visa aegis," relying on Visa's network services, would allow it "to 'compete more effectively' at the *issuer level*." *Id.* at 967 (emphasis added). But because the "issuer market * * * remains atomistic" and "remarkably unconcentrated," *id.* at 967, 968, "there was no evidence the bylaw harm[ed] consumers," *id.* at 971. The Tenth Circuit also determined that Visa's justification for Bylaw 2.06—preventing

free-riding on Visa's investment in its brand—was legitimate and outweighed any harm that flowed from a trivial limitation on intrasystem competition. *Id.* at 970, 972.

In "purpose and effect" (03-1521 Pet. 23), the exclusionary rules at issue here are hardly the "mirror image" of Bylaw 2.06 (03-1532 Pet. 16). They do not merely allow Visa and MasterCard to control their own brands and the use of their own networks; rather, they limit *intersystem* competition by precluding banks from making individual decisions to issue cards on rival networks. Critically, Bylaw 2.06 affected *intra*system competition at the issuer level, while "the primary concern of antitrust law" was and remains "*inter*brand competition." *MountainWest*, 36 F.3d at 966 (quoting *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)) (emphasis added). In contrast to *MountainWest*, where the court found "no evidence" of anticompetitive effects and ample proof of efficiency justifications, 36 F.3d at 968, 970-972, the courts below found a variety of anticompetitive effects and "no evidence" supporting petitioners' proffered procompetitive justifications. Pet. App. 22a, 161a-169a.

The difference in alleged, and proved, consumer harm between the two cases is one of type, not of "degree." 03-1532 Pet. 18. In *MountainWest*, adding one more Visa issuer might marginally enhance intrasystem competition (within Visa) at the "remarkably unconcentrated" issuer level, but would not enhance intersystem competition. See Pet. App. 47a n.10. Here, by contrast, the exclusionary rules act much more like a group boycott, preventing banks from obtaining the network services of two of only four major network competitors, and preventing consumers from obtaining products available only by combining the "special skills, exper-

tise and relationships with consumers," *id.* at 138a, of the Amex or Discover networks and member banks.

b. The D.C. Circuit's decision in *Rothery* likewise poses no conflict. In that case, the court of appeals concluded that Atlas Van Lines' policy of requiring its local carrier agents to either abandon their independent interstate authority and operate under only Atlas's authority, or create new corporations to conduct interstate carriage (and not use any Atlas equipment), did not run afoul of the Sherman Act. 792 F.2d at 211-213, 217. The court recognized that not all restraints imposed by joint ventures are ancillary or lawful. See *id.* at 224 (if "the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary"). But the court concluded that Atlas's policy was "reasonably necessary" to further the procompetitive aspects of the joint venture, *id.* at 227, while there was "no possibility that the restraints can suppress market competition," *id.* at 229.

The district court in *Rothery* concluded that Atlas's policy prevented free-riding on its "reputation, equipment, facilities, and services," 792 F.2d at 221, and the court of appeals found "the district court's conclusion that free riding existed to be amply supported and by no means clearly erroneous." *Id.* at 221-222. Moreover, the defendants in *Rothery* lacked market power: "Atlas and its agents command[ed] between 5.1 and 6% of the relevant market," making it "impossible to believe that an agreement to eliminate competition within a group of that size can produce any of the evils of monopoly." *Id.* at 217; see *id.* at 221 ("[w]e might well rest, therefore, upon the absence of market power"). The court added that, given "Atlas' market share and the structure of the market," a merger of Atlas and all of its agents "would not even be challenged under the De-

partment of Justice Merger Guidelines." *Id.* at at 230; see *id.* at 219-220.

This case bears no similarity to *Rothery*, which addressed a completely different market and competitive considerations. Here, the lower courts found that petitioners have market power. Pet. App. 14a-15a. In sharp contrast to *Rothery*, petitioners could not expect that their thousands of members, accounting for 85% of general purpose card issuance, would be permitted to merge. The lower courts found that the exclusionary rules in this case affirmatively harmed competition, *id.* at 16a-21a, and they squarely rejected petitioners' procompetitive justifications as factually unsupported, *id.* at 21a-22a. Petitioners, the two dominant networks, claim that each must require members' dedication to its joint venture, yet each exempts the other—its largest competitor—from the relevant prohibition. Thus, the court of appeals' decision in this case does no violence to the accepted principles of joint venture law set forth in *Rothery* because the facts of this case present a vastly different—and more significant—threat to competition.

5. Finally, MasterCard contends that the decision below is in "tension" (03-1532 Pet. 16) with this Court's decision in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004). See 03-1532 Pet. 19-22. MasterCard's attempt to equate the injunction of the exclusionary rules to the "forced sharing" at issue in *Trinko* fails for two reasons. First, *Trinko* addressed unilateral action alleged to constitute monopolization under Section 2 of the Sherman Act, 15 U.S.C. 2, while this case involves concerted action challenged under Section 1. The Court in *Trinko* distinguished "cases involv[ing] *concerted* action, which presents greater anticompetitive concerns." 124 S. Ct. at 880 n.3.

Second, the United States is not advocating "impos[ing] sharing obligations on joint ventures," 03-1532 Pet. 22, and the judgment below does no such thing. Rather, it prevents the two dominant payment card networks from concurrently prohibiting every competitively significant bank in the country from dealing with networks they do not control, while permitting those same banks to issue cards under the auspices of the other dominant bank-owned network. Enjoining their exclusionary rules does not force any firm—bank, joint venture, or network—"to deal with competitors" (03-1532 Pet. 21) or anyone else. Given the extensive findings in this case, enjoining those rules will unfetter competition in the relevant market and benefit consumers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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